

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 10-94:

STEVE WINCHESTER  
COMPLAINANT

- VS -

MOUNTAIN LINE - MARY PLUMLEY  
DEFENDANT

FINAL ORDER

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The above-captioned matter came before the Board of Personnel Appeals (Board) on September 27, 1995. Appearing before the Board were Margaret L. Sanner, attorney for the defendant, and Richard R. Buley, attorney for the complainant. The matter before the Board concerned whether the hearing officer properly denied a motion to dismiss the unfair labor practice charge filed by the complainant.

At the Board proceeding, Mr. Buley argued that the unfair labor practice charge is a violation of state law which results in avoidance of arbitration pursuant to the terms of the collective bargaining agreement. In contrast, Ms. Sanner argued that the unfair labor practice charge alleges a violation of the collective bargaining agreement resulting in the requirement of submitting the dispute to arbitration.

After considering the record and the arguments made by the parties, the Board finds the decision of the hearing officer which denied the motion to dismiss to be in error. Article seven of the collective bargaining agreement prohibits discrimination against a person because of union activities. A basis for the unfair labor practice charge is discrimination because of union activities. Thus the unfair labor practice charge is covered by the collective bargaining agreement and pursuant to that agreement, is subject to arbitration. This Board is of the opinion that deferral to arbitration was the proper procedure in which to present this dispute pursuant to the Collyer doctrine. See *Collyer Insulated Wire*, 192 NLRB 837 (1971).

Accordingly, the Board orders as follows:

1. IT IS HEREBY ORDERED that the hearing examiner's decision to deny defendant's motion to dismiss is reversed.
2. IT IS FURTHER ORDERED that unfair labor practice charge number 10-94 is hereby dismissed.

DATED this 2<sup>nd</sup> day of October, 1995.

BOARD OF PERSONNEL APPEALS

By

Willis M. McKeon  
WILLIS M. MCKEON  
PRESIDING OFFICER

Board members Schneider, Talcott and Hagan concur.

Board members McKeon and Henry dissent.

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NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

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CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 2<sup>nd</sup> day of October, 1995:

RICHARD R. BULEY  
ATTORNEY FOR COMPLAINANT  
TIPP & BULEY  
PO BOX 3778  
MISSOULA MT 59806-3778

MARGARET L. SANNER  
ATTORNEY FOR DEFENDANT  
MILODRAGOVICH DALE STEINBRENNER & BINNEY PC  
PO BOX 4947  
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STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 10-94:

STEVE WINCHESTER,

Complainant,

vs.

MOUNTAIN LINE - MARY PLUMLEY,

Defendant.

ORDER

\* \* \* \* \*

On September 30, 1993, Complainant filed an Unfair Labor Practice Charge (Charge) with this Board alleging that Defendant had violated Sections 39-31-401(1), (2), and (4) and 39-31-201, MCA. Complainant contended that his employment suspension and eventual discharge were based upon his union activities and role as Union Shop Steward. This Board thereafter issued a Summons.

On October 8, 1993, Defendant filed its Response denying all charges. Defendant requested that the Charge be deferred, under the Collyer Doctrine<sup>1</sup>, to the grievance and arbitration procedures set forth in the existing collective bargaining agreement.

On October 25, 1993, this Board issued a Recommended Order dismissing the Charge without prejudice finding the parties had submitted Complainant's suspension and discharge controversy to the arbitration process contained in the existing collective bargaining agreement. This Board noted that deferral to the already scheduled arbitration was proper under the Collyer Doctrine. The Recommended

<sup>1</sup> Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971)

1 Order further provided that this Board retain jurisdiction for the  
2 sole purpose of entertaining:

3 "...an appropriate and timely motion for further  
4 consideration upon a proper showing that either:  
5 the dispute has not, within a reasonable time, been  
6 resolved pursuant to the parties' negotiated  
7 grievance/arbitration procedure; or have reached a  
8 result which is repugnant to the public policy  
9 considerations of the Montana Collective Bargaining  
10 for Public Employees Act."

11 On November 2, 1993, Complainant timely filed objections to  
12 the Recommended Order. Thereafter, the matter was transferred to  
13 the Hearings Bureau for adjudication.

14 Following two pre-hearing conferences, a date for a formal  
15 hearing was scheduled and a Notice of Hearing was issued. Prior to  
16 hearing, Defendant filed a Motion To Dismiss. The parties agreed  
17 the Motion To Dismiss must be addressed prior to hearing,  
18 therefore, the hearing date was vacated and a briefing schedule was  
19 established.

20 Defendant argues in its Motion To Dismiss that Complainant's  
21 Charge, his suspension and discharge, was fully and finally decided  
22 in the binding arbitration which occurred December 1, 1993.  
23 Defendant further argues that the matter was properly deferred to  
24 arbitration under the Collyer Doctrine and the Spielberg Doctrine<sup>2</sup>.

25 Complainant argues that, pursuant to the existing collective  
26 bargaining agreement, any alleged violation of federal or state law  
27 was not subject to the grievance and arbitration procedures and,  
28 therefore, the Collyer Doctrine was inapplicable. Complainant's

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<sup>2</sup> Spielberg Manufacturing Company, 112 NLRB 1080, 36 LRM 1152  
(1955)

1 Charge alleges violations of Sections 39-31-401(1), (2), and (4)  
2 and 39-31-201, MCA.

3 In William M. Converse, Affiliated with the International  
4 Association of Fire Fighters, Local 436 v. Anaconda-Deer Lodge  
5 County, ULP No. 43-81 (April, 1982) and James Forsman, Affiliated  
6 with the International Association of Fire Fighters, Local 436 vs.  
7 Anaconda-Deer Lodge County, ULP No. 44-81 (April, 1982), this Board  
8 formally adopted the National Labor Relations Board's precedent of  
9 deferring certain unfair labor practice proceedings to an existing  
10 negotiated grievance and arbitration procedure as set forth in  
11 Collyer Insulated Wire, supra.

12 ULP No. 43-81 (William M. Converse, supra) set forth certain  
13 standards for pre-arbitral deferral;

14 "The Collyer decision emphasized that the  
15 prearbitral deferral process was appropriate where  
16 the underlying dispute centered on the  
17 interpretation of application of the collective  
18 bargaining contract.... In practical application,  
19 the factor requires that: (1) the contract  
20 contains language expressly governing the subject  
21 of the allegation, (2) the issue be deemed  
22 appropriate for resolution by an arbitrator, (3)  
23 the center of the dispute be interpretation of a  
24 contract clause rather than interpretation of  
25 provision of the Act."

26 And further, ULP No. 43-81 stated:

27 "Absent specific allegations of fact supporting a  
28 violation of Sections 39-31-401(1) or (3), MCA, the  
29 Board of Personnel Appeals can defer under the  
30 Collyer policy."

31 In this instant matter, the Charge, as asserted by  
32 Complainant, appears to be alleged violations of the Collective  
33 Bargaining Act for Public Employees and not the existing collective  
34 bargaining agreement he was subject under. The Charge, therefore,

1 does not meet the standards for deferral under the Collyer  
2 Doctrine. Therefore, Defendant's Motion To Dismiss is hereby  
3 DENIED.

4 DATED this 27<sup>th</sup> day of July, 1995.

5 BOARD OF PERSONNEL APPEALS

6  
7 By: Stan Gerke

8 STAN GERKE  
9 Hearing Officer

10 SPECIAL NOTE

11 In accordance with Board's Rule ARM 24.26.215(2), the above Order  
12 shall become the Final Order of this Board unless written  
13 exceptions are filed within twenty (20) days after service of this  
14 Order upon the parties.

15 \* \* \* \* \*

16 CERTIFICATE OF MAILING

17 The undersigned hereby certifies that true and correct copies  
18 of the foregoing documents were, this day served upon the following  
19 parties or such parties' attorneys of record by depositing the same  
20 in the U.S. Mail, postage prepaid, and addressed as follows:

21 Richard R. Buley  
22 Attorney at Law  
23 P.O. Box 3778  
24 Missoula, MT 59806-3778

25 Margaret L. Sanner  
26 Attorney at Law  
27 P.O. Box 4947  
28 Missoula, MT 59806-4947

29 DATED this 27<sup>th</sup> day of July, 1995.

Christine O'Neil